

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
AT&T Corp.,)
Complainant,)
v.) File No. EB-09-MD-010
All American Telephone Co.,)
e-Pinnacle Communications, Inc., and)
ChaseCom,)
Defendants.)

ORDER ON RECONSIDERATION

Adopted: June 10, 2014

Released: June 10, 2014

By the Commission:

I. INTRODUCTION

1. On April 30, 2010, AT&T Corp. (AT&T) filed a formal complaint against All American Telephone Co. (All American), e-Pinnacle Communications, Inc. (e-Pinnacle), and ChaseCom (ChaseCom) (collectively, Defendants) under Section 208 of the Communications Act of 1934, as amended (Act).1 On March 22, 2013, the Commission ruled in favor of AT&T on Counts I and II of the Complaint.2 Thereafter, the Defendants filed a Petition for Reconsideration and Clarification3 under Section 1.106 of the Commission's rules.4 For the reasons explained below, we dismiss the Petition on procedural grounds and, as an independent and alternative basis for this decision, deny it on the merits.

2. Beehive Telephone Co., Inc. and Beehive Telephone Co., Inc. Nevada (collectively, Beehive), which are neither parties to this litigation nor to the district court case from which this litigation

1 See Amended Formal Complaint of AT&T Corp., File No. EB-09-MD-010 (filed Apr. 30, 2010) (Complaint); 47 U.S.C. § 208. The litigation arises from two primary jurisdiction referrals from the United States District Court for the Southern District of New York (District Court).

2 AT&T Corp. v. All Am. Tel. Co., Memorandum Opinion and Order, 28 FCC Rcd 3477 (2013) (Order). AT&T elected to bifurcate the claims in Count III of its Complaint into a supplemental complaint for damages in accordance with 47 C.F.R. §§ 1.722(d)-(e). Id. at 3477, n.4; 3497, para. 45.

3 Petition for Reconsideration and Clarification of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom, File No. EB-09-MD-010 (filed Apr. 24, 2013) (Petition); see also Opposition of AT&T Corp. to Defendants' Petition for Reconsideration, File No. EB-09-MD-010 (filed May 6, 2013); Reply of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom in Support of Their Petition for Reconsideration and Clarification, File No. EB-09-MD-010 (filed May 13, 2013) (Reply).

4 47 C.F.R. § 1.106.

arose, also filed a Petition for Reconsideration.⁵ As discussed below, we dismiss the Beehive Petition because Beehive has not satisfied the requirements for non-parties to seek reconsideration of a Commission order in an adjudicatory proceeding.

II. BACKGROUND⁶

3. At all relevant times, the Defendants purported to provide terminating interstate switched access services to AT&T, an interexchange carrier, pursuant to federal tariffs that the Defendants filed with the Commission. The Defendants charged AT&T for terminating interstate switched access services, but AT&T refused to pay, asserting that the Defendants were not providing such services in accordance with their federal tariffs and were sham entities.

4. The Defendants sued AT&T in federal district court to collect the access charges billed, alleging, *inter alia*, that AT&T's refusal to pay violated the Defendants' federal tariffs, Section 201(b) of the Act, and Section 203(c) of the Act.⁷ AT&T filed an answer and counterclaims, asserting federal law claims that Defendants violated Sections 201(b) and 203 of the Act.⁸ AT&T also claimed that, regardless of whether Defendants provided access services pursuant to tariff, they committed unreasonable practices through "sham" arrangements designed for the purpose of inflating access charges.⁹ The District Court issued two primary jurisdiction referrals. The First Court Referral Order, issued on March 16, 2009, referred AT&T's "sham entity" counterclaim to the Commission.¹⁰ AT&T effectuated this referral by filing an informal complaint with the Commission on April 15, 2009, which it converted into a formal complaint on November 16, 2009.¹¹

5. Thereafter, Defendants requested that the District Court refer additional issues to the Commission, which the District Court did on February 5, 2010.¹² At Commission staff's direction, AT&T filed an Amended Complaint to effectuate certain issues in the Second Court Referral Order.¹³

⁵ Petition for Reconsideration, File No. EB-09-MD-010 (filed Apr. 24, 2013) (Beehive Petition); *see also* Opposition of AT&T Corp. to Beehive Telephone Co., Inc.'s Petition for Reconsideration, File No. EB-09-MD-010 (filed May 6, 2013); Reply to Opposition to Petition for Reconsideration, File No. EB-09-MD-010 (filed May 13, 2013) (Beehive Reply).

⁶ This is an abridged description of the factual and legal background. The *Order* contains a more complete discussion of the background, which is incorporated herein by reference. *See Order*, 28 FCC Rcd at 3478–87, paras. 2–23.

⁷ *Id.* at 3486–87, para. 22.

⁸ *Id.*

⁹ *Id.*

¹⁰ *All Am. Tel. Co., Inc. v. AT&T, Inc.*, Memorandum & Order, 07-Civ 861, 2009 WL 691325 (WHP) (Mar. 16, 2009) (First Court Referral Order).

¹¹ *Order*, 28 FCC Rcd at 3487, para. 23. *See* Formal Complaint of AT&T, File No. EB-09-MD-010 (filed Nov. 16, 2009).

¹² *All Am. Tel. Co., Inc., et al. v. AT&T, Inc.*, Order Referring Issues to the Federal Communications Commission, 07-Civ 861, (WHP) (Feb. 5, 2010) (Second Court Referral Order). *See also All Am. Tel. Co., Inc., et al. v. AT&T, Inc.*, Memorandum & Order, 07-Civ 861, 2010 WL 7526933 (Jan. 19, 2010) (Second Court Referral Memorandum Opinion).

¹³ *Order*, 28 FCC Rcd at 3486–87, para. 23. *See* Letter Ruling from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, to James F. Bendernagel, Jr., Counsel for AT&T, and Jonathan Canis, Counsel for Defendants, File No. EB-09-MD-010 (filed Apr. 2, 2010). At the same time, the Defendants filed their own formal complaint to effectuate the remaining issues in the Second Court Referral Order, which the Commission has already resolved. *See All Am. Tel. Co. v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723 (2011) (*All American v. AT&T*), *recon. denied*, 28 FCC Rcd 3469 (2013) (*All American v. AT&T Recon. Order*).

After the pleading cycle closed, the Commission ruled in favor of AT&T on Counts I and II of its Complaint.¹⁴ The Commission found, based on the totality of the record, that Defendants were “sham” Competitive Local Exchange Carriers (CLECs) created to “capture access revenues that could not otherwise be obtained by lawful tariffs,” and that billing AT&T for access charges in furtherance of this scheme constitutes an unjust and unreasonable practice in violation of Section 201(b) of the Act.¹⁵ The Commission also found that Defendants violated Sections 201(b) and 203 of the Act by billing for services that they did not provide pursuant to valid and applicable tariffs.¹⁶

III. DISCUSSION

A. We Dismiss Defendants’ Petition on Procedural Grounds.

6. The Defendants’ Petition and Reply repeat many arguments that the Commission has already fully considered and rejected. These include the Defendants’ assertions that (1) the Commission ignored a statutory deadline;¹⁷ (2) the Commission ignored the contentions made in Defendants’ March 15th Request for Declaratory Ruling;¹⁸ (3) the *Order* was based upon a collateral attack on the rates and practices of a non-party that were never subject to investigation;¹⁹ (4) Defendants’ rates are “conclusively deemed reasonable” because Beehive’s rates are “deemed lawful” and are the only rates that could apply;²⁰ (5) Defendants’ discovery rights were unreasonably restricted;²¹ (6) the formal complaint process was inherently prejudicial to the Defendants and failed to answer critical questions referred by the District Court;²² (7) the complaint proceeding took a fragmented view of the service provided in order to prevent the Defendants from defending themselves;²³ (8) the *Order* failed to address *AT&T v. Jefferson Telephone*;²⁴ (9) the *Order* made findings that are inconsistent with established Commission precedent;²⁵ and (10) the formal complaint process was designed to reach a predetermined conclusion and

¹⁴ *Order*, 28 FCC Rcd at 3497, para. 44. Count I of AT&T’s Complaint effectuates Issues 1a to 1e of the Second Court Referral Order, and Count II effectuates the issues in the First Court Referral Order. Count III, which AT&T bifurcated into a supplemental complaint for damages, effectuates issues 2, 3, 5a, 5c, 5d, and 5e of the Second Court Referral Order. *See id.* at 3487, nn.98–99.

¹⁵ *Order*, 28 FCC Rcd at 3487–92, paras. 24–33. The Commission did not base its conclusions, as Defendants contend, on a “single finding—that the rates that the [Defendants] billed and sought to collect are excessive.” *See* Petition at 9, 12–13.

¹⁶ *Order*, 28 FCC Rcd at 3492–95, paras. 34–41.

¹⁷ *Compare* Petition at 4–9, *with Order*, 28 FCC Rcd at 3497, para. 43, n.190.

¹⁸ *Compare* Petition at 8-9, *with Order*, 28 FCC Rcd at 3496, para. 42, n.183. *See* Request for Declaratory Ruling In Response to Recent Order by Southern District of New York re Primary Jurisdiction Referral In File No. EB-09-MD-010 (filed Mar. 15, 2012) (March 15th Request for Declaratory Ruling).

¹⁹ *Compare* Petition at 9–13, 18; Reply at 1–2, *with Order*, 28 FCC Rcd at 3492, para. 33, nn.143–45.

²⁰ *Compare* Petition at 11–12, *with Order*, 28 FCC Rcd at 3491–92, para. 31, nn.137–39.

²¹ *Compare* Petition at 12-13, *with Order*, 28 FCC Rcd at 3496–97, paras. 42–43, n.186–90 (endorsing Bureau analysis). *See* Letter from Lisa B. Griffin, Deputy Division Chief, EB/MDRD to Jonathan Canis, Counsel for All American, and James F. Bendernagel, Jr., Counsel for AT&T, File No. EB-09-MD-010 (filed Sept. 2, 2010).

²² *Compare* Petition at 13–16, *with Order*, 28 FCC Rcd at 3496–97, paras. 42–43, nn.182–83, 189 (endorsing Bureau analysis). *See* Letter from Lisa B. Griffin, Deputy Division Chief, EB/MDRD to Jonathan Canis, Counsel for All American, and James F. Bendernagel, Jr., Counsel for AT&T, File No. EB-09-MD-010 (filed Apr. 27, 2010) (concluding that “relevant factors of law, policy, and practicality” supported the procedural rulings).

²³ *Id.*

²⁴ *Compare* Petition at 12, n.19, *with Order*, 28 FCC Rcd at 3491–92, para. 32, nn.140–42.

²⁵ *Compare* Petition at 2–4, 20–23; Reply at 3–4, *with Order*, 28 FCC Rcd at 3490–93, paras. 30–32, nn.124–42.

demonstrated bias.²⁶ Defendants' repetition of the same arguments here does not provide grounds for reconsideration.²⁷

7. The balance of the Defendants' arguments could—and thus should—have been made before the Commission released the *Order*. These include Defendants' assertions that (1) the Commission's procedural decisions in the complaint proceeding and action in a related tariff proceeding demonstrated bias;²⁸ and (2) Defendants' tariffs allowed service to be provided by contract.²⁹ Accordingly, we dismiss the Petition on procedural grounds.³⁰

B. We Otherwise Deny the Petition on the Merits.

8. As an independent and alternative basis for this decision, we deny the Petition on the merits.³¹ As detailed below, the Petition offers no basis that warrants altering the Commission's findings.

1. The Defendants' Attacks on Procedural Rulings Are Unfounded.

9. Defendants' challenges to the Commission's procedural rulings are baseless. First, the Defendants incorrectly assert that the Commission failed to address the merits of their March 15th Petition for Declaratory Ruling.³² That Petition was a request that the Commission reconsider its earlier procedural orders regarding implementation of the District Court referrals. The Commission already had

²⁶ Compare Petition at 1–20; Reply at 1–3, 10, with *Order*, 28 FCC Rcd at 3496–97, paras. 42–43, nn.181–90.

²⁷ See 47 C.F.R. § 1.106(p)(3) (providing that petitions for reconsideration of a Commission action that “[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding” are among those that “plainly do not warrant consideration by the Commission” and may therefore be dismissed by a bureau).

²⁸ Petition at 18–19.

²⁹ Petition at 21, n.38. In any event, the contract provisions in Defendants' tariffs concern their relationships with interexchange carriers, such as AT&T, not their conferencing service provider customers with which they contend they had agreements. Compare All American Tariff No. 4, Definition of Individual Case Basis (“An arrangement . . . based on the specific and unique circumstances of the Customer's situation.”), with Definition of Customer (“The term ‘Customer’ refers to an Interexchange Carrier.”). See, e.g., *Qwest Commc'ns Co. v. Sancom, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 1982, 1992–93, paras. 24–25 (Enf. Bur. 2013).

³⁰ See *Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC*, Order on Reconsideration, 26 FCC Rcd 14520, 14522–23, paras. 5–6 (2011) (“It is ‘settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.’”) (citing *S&L Teen Hosp. Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900, para. 3 (2002) (citations omitted); *All American v. AT&T Recon. Order*, 28 FCC Rcd at 3471–72, para. 6 (same). See also 47 C.F.R. §§ 1.106(c)(1), (p)(1)–(2).

³¹ We also deny All American's Emergency Motion to Address Jurisdictional and Due Process Issues, File No. EB-09-MD-010 and EB-13-MD-003 (filed Dec. 19, 2013) (Emergency Motion). To begin, All American has not demonstrated that there is an “emergency” warranting separate Commission action. In any event, we address in this Order all of the issues raised in the Emergency Motion relating to All American. Moreover, we will address any issues relating to Beehive in EB-13-MD-003 (the complaint proceeding to which Beehive is a party). See *infra* note 84. Finally, we note that All American filed its Emergency Motion under Section 1.41 of the Commission's rules, which does not apply here. See 47 C.F.R. § 1.41 (“Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally.”). This is a formal complaint proceeding governed by the Commission's formal complaint rules, and any “request to the Commission for an order” should have been made in accordance with rule 1.727. 47 C.F.R. § 1.727(a). We will not countenance attempts by parties to make end runs around the Commission's formal complaint rules by filing motions under rule 1.41. See *In the Matter of Warren C. Havens*, Memorandum Opinion and Order, 28 FCC Rcd 16261, 16267–68 (2013) at para. 18 (“The Commission regularly declines to consider ‘informal’ requests for Commission action under Section 1.41 when there are formal procedures available to the requesting parties . . . Section 1.41 is not an invitation to . . . gamesmanship in presenting arguments to the Commission.”).

³² Petition at 8–9. See March 15th Request for Declaratory Ruling.

twice rejected the Defendants' suggested approach to effectuate the District Court referrals, and we deny their attempt here as repetitive.³³

10. Second, Defendants argue that they were improperly denied opportunities for discovery.³⁴ The Defendants' argument mischaracterizes their discovery requests and the Commission staff's discovery-related rulings. Section 1.729(a) of the Commission's rules provides that "[r]equests for interrogatories . . . may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding,"³⁵ and the staff's discovery rulings were consistent with that rule.³⁶ Specifically, the staff granted all of Defendants' discovery requests relating to Beehive,³⁷ and four requests relating to bifurcated damages issues were denied without prejudice.³⁸ Neither of the two remaining discovery requests denied by staff pertained to Beehive and, consequently, would not have been useful to rebut the testimony challenged by the Defendants.³⁹

11. Third, the Defendants claim that the Commission failed to provide the District Court with guidance it purportedly sought when the Defendants asked the District Court to allow them to pursue additional discovery in the court proceedings.⁴⁰ The District Court never sought guidance on that discovery request and, in fact, expressly denied the Defendants' request. The District Court has never suggested that the Commission should modify its processes.⁴¹ On the contrary, the District Court expressly declined Defendants' invitation to "micromanage the agency's interlocutory determinations."⁴²

³³ See *Order*, 28 FCC Rcd at 3496–97, paras. 42–43, nn.183, 189.

³⁴ See Petition at 12–13 (citing Letter Requesting Reconsideration of July 28, 2010 Letter Rulings, File Nos. EB-09-MD-010, EB-10-MD-003 at 6, 8, and 9 (filed Aug. 20, 2010)); Reply at 10.

³⁵ See 47 C.F.R. § 1.729(a).

³⁶ Defendants wrongly contend that adverse discovery rulings prevented them from obtaining evidence from Beehive witnesses, which they could use to refute testimony from an AT&T witness regarding where All American's traffic terminated. Petition at 12–13. In finding that the entirety of All American's traffic "terminated at its affiliate Joy's equipment located in Beehive's facilities in Utah and not in Nevada," the Commission relied upon the deposition testimony of the only Beehive employee with direct knowledge of the facts, and All American participated in the deposition. *Order*, 26 FCC Rcd. at 3484, para. 17. All American relied upon other Beehive witnesses to counter this finding, but those witnesses did not have direct knowledge of the facts. *See id.* at 3484, para. 17, nn.62, 64.

³⁷ See All American, e-Pinnacle and ChaseCom's First Request for Interrogatories to Complainant AT&T Corp.'s Amended Complaint, File No. EB-09-MD-010, Request Numbers 1 and 9 (filed June 14, 2010) (Defendants' First Request for Interrogatories); *see also* Letter from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, to James F. Bendernagel, Jr., Counsel for AT&T, and Jonathan Canis, Counsel for Defendants, File No. EB-09-MD-010 at 4 (filed July 28, 2010) (July 28, 2010 Letter Ruling).

³⁸ See Defendants' First Request for Interrogatories, Request Numbers 2, 7, 8, 10; July 28, 2010 Letter Ruling at 4. Defendants are free to raise these requests in any damages proceeding.

³⁹ See Defendants' First Request for Interrogatories, Request Number 5 (regarding AT&T's Conferencing Service Global Option), and Request Number 6 (regarding AT&T's provision of conferencing services). Defendants' Petition references other discovery rulings made in a different case, which the Commission previously resolved and affirmed on reconsideration. *See All American v. AT&T*, 26 FCC Rcd at 726, para. 8. That case involved one legal issue—*i.e.*, whether AT&T violated Sections 201(b), 203(c), or any other provision of the Act by failing to pay billed charges for the calls at issue. The Commission determined from the parties' pleadings that no material facts were in dispute, and accordingly determined that the discovery the CLECs sought, as well as any briefing, was unnecessary. *See id.*

⁴⁰ See Petition at 8–9 (citing March 15th Request for Declaratory Ruling).

⁴¹ See *All Am. Tel. Co., Inc., et al. v. AT&T, Inc.*, Order, No. 07-Civ 861, (S.D.N.Y. Apr. 19, 2011) (noting that the Commission has "prioritized the questions, facilitated the completion of discovery and briefing, and issued two

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12. Nor did the Commission act in an arbitrary and capricious manner by not answering all of the referred questions in one proceeding.⁴³ AT&T elected to bifurcate its liability and damages claims, as it was entitled to do under Commission rules.⁴⁴ Commission staff ruled that the issues raised in Count III of AT&T's Complaint (alleging that the Defendants are not entitled to collect any compensation for access services under a *quantum meruit*, quasi-contract, constructive contract, or any other state law theory) would be addressed in AT&T's supplemental complaint for damages, if any.⁴⁵ Thus, the damages proceeding will encompass the remaining issues referred by the District Court, including the issues on which Defendants request clarification.⁴⁶

13. Fourth, Defendants contend that, "under established precedent," the Commission lacks jurisdiction in any further proceedings to determine what rate, if any, AT&T must pay for the services Defendants provided.⁴⁷ As this issue was not decided in the *Order*, but will be adjudicated during a later damages phase, it is not ripe for reconsideration.⁴⁸ Moreover, *All American v. AT&T* does not support their assertion.⁴⁹ *All American v. AT&T* addressed whether a collection action for a customer-carrier's failure to pay another carrier's tariffed charges gives rise to a claim under Section 208 for breach of the Act itself. The Commission found that it did not.⁵⁰ That order says nothing at all about a customer's (AT&T's) claims against carriers (Defendants) concerning the carriers' unjust and unreasonable conduct. In addition, in both of its referrals, the District Court found that the Commission has the expertise and "is in the best position" to determine the appropriate rate for the Defendants' services,⁵¹ and that any decision by the District Court to set an appropriate rate might discriminate against other customers of the CLECs.⁵²

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rulings"); Order, No. 07-Civ 861 (S.D.N.Y. Feb. 28, 2012) ("the FCC continues to make progress, so the prospect of a *de facto* indefinite stay is remote").

⁴² *All Am. Tel. Co., Inc., et al. v. AT&T, Inc.*, Order, No. 07-Civ 861 (S.D.N.Y. Feb. 28, 2012).

⁴³ Petition at 13–16.

⁴⁴ See Order, 28 FCC Rcd at 3477, n.4; 3497, para. 45.

⁴⁵ See *id.*

⁴⁶ See *supra* note 15; Petition at 23–25; Reply at 6–9. Thus, we decline Defendants' request to "clarify [the] legal and jurisdictional consequences" of the *Order*. Petition at 23–25; Reply at 6–9.

⁴⁷ Petition at 16–17; Reply at 8-9.

⁴⁸ See 47 C.F.R. § 1.106(p)(5).

⁴⁹ See Petition at 16–17 (citing *All American v. AT&T Recon. Order*, 28 FCC Rcd at 3470–71, para. 5, 3472; para. 7).

⁵⁰ See *All American v. AT&T*, 26 FCC Rcd at 726, para. 9. Similarly unavailing is Defendants' reliance on *Qwest Commc'ns Corp. v. Farmers and Merchs. Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973, 17984-85 (2007) (*Qwest v. Farmers*) (stating that "any complaint instituted by [a carrier] to recover fees allegedly owed by [another carrier] would constitute a 'collection action,' which the Commission repeatedly has declined to entertain"). See Petition at 16 n.29.

⁵¹ See First Court Referral Order, 2009 WL 691325 at *4. Indeed, Defendants also requested the second referral over AT&T's objection, and they framed the "rate" questions for the District Court that they now claim the Commission lacks jurisdiction to address. See Second Court Referral Memorandum Opinion, 2010 WL 7526933 at *2; see also Second Court Referral Order at 2–4.

⁵² See First Court Referral Order, 2009 WL 691325 at *4.

2. Defendants Have Adduced No Evidence that the Commission Is Biased.

14. The Defendants' claim that the Commission is biased has no merit whatsoever.⁵³ Administrative officials are presumed to be honest, objective, and capable of judging particular controversies fairly and on the basis of their own circumstances.⁵⁴ To prevail on their claim that Commission bias has denied them due process, Defendants must show "an unacceptable probability of actual bias on the part of those who have actual decisionmaking power."⁵⁵ The Defendants have not produced any meaningful evidence to meet that burden. Instead, they merely cite their objections to the Commission's handling of the District Court's primary jurisdiction referrals as purported evidence of bias. The Defendants offer no reason to revisit the Commission's rejection of those objections.⁵⁶ Adverse rulings in proceedings are not by themselves sufficient to show actual bias, and bias cannot be inferred from a pattern of rulings on motions.⁵⁷

15. Characterizing AT&T's claims as falling within the scope of Section 208(b)(1) of the Act, Defendants claim that the *Order* is untimely under that provision's requirement that the Commission issue an order within five months of the date the underlying complaint was filed.⁵⁸ Defendants contend that the Commission's alleged failure to meet the deadline further evidences bias against them.⁵⁹ The Commission has made it clear, however, that Section 208(b)(1)'s deadline applies only to formal complaints that involve "investigation[s] into the lawfulness of a charge, classification, regulation or practice" contained in tariffs filed with the Commission.⁶⁰ AT&T does not challenge the lawfulness of a charge, classification, regulation or practice contained in a tariff that would fall within the parameters of Section 208(b)(1). Instead, AT&T asserts that the Defendants misapplied their tariff and that they—wholly apart from their tariffs—engaged in conduct that violates Section 201(b).⁶¹ Thus, the Defendants have not demonstrated that the Commission violated a statutory directive.⁶²

⁵³ Petition at 9–20; Reply at 1–4, 10. Relying on arguments in Beehive's Petition, the Defendants request recusal of Enforcement Bureau staff. *See* Reply at 10. As discussed below in connection with the Beehive Petition, there is no basis for granting this request. *See infra* note 84.

⁵⁴ *See United States v. Morgan*, 313 U.S. 409, 421 (1941); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Morris v. City of Danville, Va.*, 744 F.2d 1041, 1044 (4th Cir. 1984).

⁵⁵ *U.S. v. State of Or.*, 44 F.3d 758, 772 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995).

⁵⁶ Defendants also argue that bias can be inferred from the Commission's rejection of All American's Tariff No. 4. Petition at 18–19. Not only is this argument factually incorrect (the Wireline Competition Bureau rejected All American's Tariff No. 3—not Tariff No. 4—because it did not "clearly establish a rate," *see* Petition Attachment 7 (*All American Telephone Co., Inc., Tariff F.C.C. No. 3*, Order, 25 FCC Rcd 5661 (WCB/PPD May 21, 10)) at 2-3, it affords no basis for granting reconsideration because the Defendants make this argument for the first time in the Petition. *See* 47 C.F.R. § 1.106(p)(2).

⁵⁷ *See McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th Cir. 1989); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 728 (6th Cir. 1986).

⁵⁸ Petition at 4–9; Reply at 4–6.

⁵⁹ *Id.*

⁶⁰ *See Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed when Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 24512–16, paras. 34–37 (1997); Order on Reconsideration, 16 FCC Rcd 5681, 5684, para. 6 (2001).

⁶¹ *See Order*, 28 FCC Rcd at 3487, para. 23.

⁶² *Teamsters Local Union*, which addressed the consequences of an agency's failure to abide by a 45-day deadline that applied to a disciplinary proceeding, thus is irrelevant. *See* Petition at 9, n.15 (citing *Teamsters Local Union 1714 v. Pub. Emp. Relations Bd.*, 579 A.2d 706, 711 (D.C. Cir. 1990)). *Cf. Farmers & Merchs. Mut. Tel. Co. v. FCC*, 668 F.3d 714, 718 (D.C. Cir. 2011) (even if the Commission failed to meet Section 208(b)(1)'s deadline in a

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3. The Order Is Consistent with the Prospective *USF/ICC Transformation Order*.

16. Defendants incorrectly assert that the Commission's findings contravene the *USF/ICC Transformation Order*.⁶³ As the Defendants acknowledge, the *USF/ICC Transformation Order* is prospective and has no binding effect on complaints that were pending at the Commission at the time of its adoption and release.⁶⁴ Nevertheless, relying upon snippets from and mischaracterizations of the *USF/ICC Transformation Order*, Defendants argue that carriers who act unjustly and unreasonably in violation of the Act and Commission rules may do so with impunity as long as they benchmark their access rates to the competing incumbent local exchange carrier.⁶⁵ Nothing in the *USF/ICC Transformation Order* supports this contention. Indeed, the Commission's prior decisions demonstrate the exact opposite to be the case.⁶⁶

17. The *USF/ICC Transformation Order* is completely consistent with the outcome of this case. The *USF/ICC Transformation Order* took immediate steps to curtail “wasteful arbitrage schemes” that resulted in consumer costs exceeding hundreds of millions of dollars annually, and specifically identified access stimulation as one of the “most prevalent arbitrage activities.”⁶⁷ The record in this proceeding overwhelmingly demonstrates that the Defendants were created to exploit exactly the type of loopholes that the *USF/ICC Transformation Order* attempts to close.⁶⁸ The *USF/ICC Transformation*

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matter—unlike this case—where the deadline applies, it would not lose jurisdiction “because Congress established no consequence for failing to meet th[e] deadline.”).

⁶³ Petition at 20–23; Reply at 3–4. *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 176634 (2011) (*USF/ICC Transformation Order*), *pets. for review pending*, *Direct Commc 'ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases). Although Defendants argue that the *Order*'s findings also contravene other relevant Commission precedent, they cite nothing other than the *USF/ICC Transformation Order*. See Petition at 20–23; Reply at 3–4.

⁶⁴ See Reply at 4. See also *USF/ICC Transformation Order*, 26 FCC Rcd at 17889, n.1182. The *USF/ICC Transformation Order* thus complements prior decisions and did not overturn or supersede them. See *id.*; see also *USF/ICC Transformation Order*, Order, 27 FCC Rcd 605, 613, para. 25 (WCB 2012).

⁶⁵ Petition at 21–22.

⁶⁶ See *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*2001 CLEC Access Charge Order*) (permitting CLECs to tariff *qualifying rates* and limiting complaint challenges regarding the reasonableness of such *qualifying rates*); *Qwest Commc 'ns Co. v. N. Valley Commc 'ns*, Memorandum Opinion and Order, 26 FCC Rcd. 8332 (2011) (finding CLEC's tariff violated section 201(b) of the Act); *AT&T Corp. v. YMax Commc 'ns Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742 (2011) (finding that CLEC violated Sections 201(b) and 203 of the Act by billing for services not covered by the terms of its tariff); *Qwest Commc 'ns Co., LLC v. Sancom, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd. 1982 (Enf. Bur. 2013) (same). See also *Qwest Commc 'ns Corp. v. Farmers & Merchs. Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd. 14801 (2009), *recon. denied*, 25 FCC Rcd. 3422 (2010), *aff'd*, 668 F.3d 714 (D.C. Cir. 2011) (same with respect to incumbent local exchange carrier). Cf. *USF/ICC Transformation Order*, 26 FCC Rcd 17663 (finding that revised rules will facilitate the Commission's complaint enforcement processes).

⁶⁷ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17676, para. 33; 17873, para. 649; 17875, paras. 662–63.

⁶⁸ Defendants argue that a number of the *Order*'s findings “are in violation of the Commission's rules governing access stimulation.” See Petition at 20–21. Yet the Defendants fail to identify any particular rules in support of their assertion, beyond those promulgated by the prospective *USF/ICC Transformation Order*. Moreover, in many instances, Defendants' arguments are not supported by the authority they cite. Compare Petition at 21, with *Order*, 26 FCC Rcd at 3483–84, para. 17; 3488–89, paras. 25, 27.

Order does not, as Defendants contend, “expressly legitimize” access stimulation in every instance.⁶⁹ Nor does it insulate the Defendants from the consequences of a finding that their conduct was unjust, unreasonable, and unlawful, in violation of the Act and the Commission’s rules.⁷⁰

C. We Dismiss Beehive’s Petition for Reconsideration.

18. In order to seek reconsideration of a Commission order in an adjudicatory proceeding to which it was not a party, a petitioner must (1) demonstrate with particularity that the petitioner’s “interests are adversely affected” by the order, *and* (2) show that the petitioner has “good reason why it was not possible for [the petitioner] to participate in the earlier stages of the proceeding.”⁷¹ Beehive fails to satisfy either requirement.

19. Beehive maintains that its interests are adversely affected by the *Order* because other interexchange carriers could use the Commission’s “sham entity” finding as precedent in an action seeking damages from Beehive.⁷² Beehive has not identified any actual damages or economic injury it has sustained as a result of the *Order*; rather, it focuses exclusively on potential future or hypothetical damages. The Commission has made clear, however, that a party is neither adversely affected nor aggrieved by “the mere precedential value of an adjudicatory order in a section 208 complaint proceeding.”⁷³

20. Beehive next asserts that the *Order* deprives it of its constitutional due process right to a fair hearing in connection with the “sham arrangement” issue that the United States District Court for the District of Utah referred to the Commission in separate litigation involving Beehive, Sprint Communications Company L.P. (Sprint), and All American.⁷⁴ In Beehive’s view, the *Order* prejudged the “sham arrangement” issue referred in the *Utah Referral Order*, and the Commission purportedly did not afford Beehive “proper notice and . . . an opportunity to present a defense” before issuing the *Order*.⁷⁵ But the *Order* contained no findings that Beehive violated Section 201(b), which is what Beehive contends triggered notice and due process obligations.⁷⁶ The Commission’s complaint proceedings are a matter of public record, and the Commission was under no obligation to notify Beehive—which was not a party to this proceeding—of the allegations relating to it. Regardless, it is undisputed that Beehive was

⁶⁹ Neither Defendants’ argument regarding the *USF/ICC Transformation Order*’s definition of “revenue sharing agreements,” Petition at 21–22, nor their argument concerning other carriers’ tariffs that were amended to include “chat” and conference operators in their definitions of “end user,” Petition at 22–23 (citing Reply Brief at 5), has any bearing on our determinations in this order concerning whether Defendants complied with their tariffs.

⁷⁰ See Reply at 4.

⁷¹ 47 C.F.R. § 1.106(b)(1).

⁷² Beehive Petition at 10; Beehive Reply at 3.

⁷³ *All Am. Tel. Co. v. AT&T Corp.*, Order, 26 FCC Rcd 15016, 15017–18, para. 6 (Enf. Bur. 2011). See also *AT&T Corp. v. Bus. Telecom, Inc.*, Order on Reconsideration, 16 FCC Rcd 21750, 21752–54, paras. 6–7 (2001) (“Petitioners have not directed us to any Commission or court case law suggesting that the precedential value of an adjudicatory order in a section 208 complaint proceeding can ‘adversely affect’ a non-party to the adjudication within the meaning of section 405(a) of the Act and section 1.106 of the Commission’s rules.”).

⁷⁴ Beehive Petition at 10; Beehive Reply at 3–4. See *Beehive Tel. Co., Inc., Beehive Tel. Co. of Nevada, Inc. v. Sprint Commc’ns, Co., L.P. v. All Am. Tel. Co., Inc.*, Order of Referral to the Federal Communications Commission, No. 2:08-cv-00380 (C.D. Utah Dec. 7, 2012) (*Utah Referral Order*).

⁷⁵ Beehive Petition at 11, 15–17; Beehive Reply at 3–4, 9–10.

⁷⁶ Beehive Petition at 10.

fully aware of the allegations in AT&T's complaint that resulted in the *Order*, and that Beehive chose not to intervene in the proceeding.⁷⁷

21. Nor has the *Order* deprived Beehive of the opportunity to have the issues raised in the *Utah Referral Order* heard by a neutral decision-maker.⁷⁸ The *Utah Referral Order* requests the Commission's guidance regarding the application of *Beehive's tariff* when considered in the context of undisputed facts.⁷⁹ Beehive's tariff was not at issue in the *Order*, and the Commission made no determinations regarding Beehive's tariff or whether Beehive's conduct violated Section 201(b) of the Act.⁸⁰ Beehive has no basis for claiming that it has been denied due process before it even has had the opportunity to present its defenses to Sprint's claims.⁸¹ Nor is Beehive correct in assuming that the Commission will not give Beehive a full and fair opportunity to defend itself. Beehive will have ample opportunity, consistent with the terms of the *Utah Referral Order*,⁸² to present its legal arguments and defenses regarding the issues identified in the *Utah Referral Order* during the course of the Sprint complaint proceedings,⁸³ and those issues will be decided based on the record in that case.⁸⁴

⁷⁷ See *infra* para. 22.

⁷⁸ Beehive Petition at 10, 15–17; Beehive Reply at 8–10.

⁷⁹ See *Utah Referral Order* at 2, para. 5 (referring to the Commission, among other issues, the question of “whether Beehive . . . provided switched access service or any other service to Sprint under the applicable tariffs” and “whether the relationship between Beehive and [All American] and/or Joy Enterprises, Inc. was a so-called sham arrangement within the meaning of any particular FCC doctrine and, if so, what is the effect of that determination in the application of the tariffs at issue in this case”). The *Utah Referral Order* stated that Beehive may not dispute the facts identified as “undisputed” in the *Utah Referral Order* in “proceedings before the FCC or in further proceedings in [the] court.” *Utah Referral Order* at 5, para. 8.

⁸⁰ The “general rule” is that a party is “not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008); see also *TSR Wireless v. US West Commc'ns*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11173–74, para. 15 (2000) (under the doctrine of collateral estoppel, a “judgment in a prior suit precludes relitigation *by the same parties* of issues actually litigated and necessary to the outcome of the first action”) (emphasis added).

⁸¹ Beehive Petition at 11.

⁸² Although Beehive disputes the Enforcement Bureau's decision to comply with *Utah Referral Order's* directive concerning undisputed facts, see Beehive Petition at 13, 17, its objection is properly directed to the District Court, not the Commission.

⁸³ Sprint filed its complaint against Beehive—which effectuates the Utah court's referral, on July 30, 2013. See *Formal Complaint of Sprint Communications Company L.P.*, File No. EB-13-MD-013 (filed July 30, 2013) (Sprint Complaint).

⁸⁴ Beehive argues that this proceeding should be consolidated with the *Sprint v. Beehive* complaint proceeding, and that the Enforcement Bureau's Market Disputes Resolution Division should be recused from further participation in the consolidated proceeding. Beehive Petition at 8-9, 12, 16-17. Beehive advanced similar arguments in a Motion to Consolidate and Reassign (which it filed in this case and in *Sprint v. Beehive*), and the Bureau considered and rejected them. See *AT&T Corp. v. All Am. Tel. Co.*, File No. EB-09-MD-010 and *Sprint Commc'ns Co., L.P. v. Beehive Tel. Co., Inc.*, File No. EB-13-MD-003, Order, 28 FCC Rcd 15772 (Enf. Bur. 2013) (*Motion to Consolidate and Reassign Order*). Beehive sought review of the *Motion to Consolidate and Reassign Order* in an application for review (again, filed in both proceedings). See Application for Review, File Nos. EB-09-MD-010, EB-13-MD-003 (filed Dec. 5, 2013) (Application for Review). We find the Bureau's analysis to be thorough and well-reasoned, and we see no reason to disturb its conclusions. Because Beehive is not a party to this proceeding, and it has failed to satisfy the requirements for seeking reconsideration of the Commission's *Order* in this proceeding, its Application for Review should be considered in the *Sprint v. Beehive* case only. See 47 U.S.C. §§ 154(i), (j). Consequently, we will address the Application for Review in that proceeding.

22. Beehive offers no credible justification for failing to seek to intervene earlier in this proceeding. To begin, Beehive's reliance upon the notice requirement in Section 1.223(a) of the Commission's rules, which concerns proceedings designated for hearing in cases involving applications for construction permits and station licenses, is misplaced.⁸⁵ This rule is inapplicable here because this case has not been designated for hearing and does not involve applications for construction permits and station licenses. Although in Section 208 complaint cases the Commission has looked to rule 1.223(b)'s standards for intervention (*i.e.*, whether the party has an interest in the proceeding and how participation will assist the Commission),⁸⁶ it has not adopted that rule's notice requirement outside of the cases which the rule governs. Moreover, notice to Beehive would have been completely unnecessary. As Beehive readily admits, for more than two years prior to release of the *Order*, it knew of the claims implicating its conduct and could have sought leave to participate in the case.⁸⁷ Beehive chose not to.⁸⁸ *AT&T v. BellSouth*,⁸⁹ which Beehive cites,⁹⁰ articulates the standard the Commission uses when evaluating petitions for reconsideration by non-parties in complaint proceedings, and it supports denial of the Beehive Petition because Beehive could have attempted to intervene in this case if it were concerned about protecting its rights.⁹¹ The public record in this case gave Beehive "every reason to understand that

⁸⁵ 47 C.F.R. § 1.223(a). See Beehive Reply at 4–6. See also *Tex. Cable and Telecommunications Ass'n v. GTE Sw., Inc.*, Order, 17 FCC Rcd 6261, 6264, para. 9 (2002) ("Section 1.223 is not directly applicable in [pole attachment complaint proceedings] because it applies to cases designated for hearing.").

⁸⁶ See *Teleconnect Co. v. The Bell Co. of Pa.*, Memorandum Opinion and Order, 6 FCC Rcd 5202, 5206, para. 19, n.52 (Com. Car. Bur. 1991), *aff'd on review*, 10 FCC Rcd 1626 (1995) ("Although [Section 1.223(b)] addresses intervention in an evidentiary hearing, we believe it to be a useful standard when considering the petition before us."). See also *All Am. Tel. Co., et al. v. AT&T Corp.*, Order, 26 FCC Rcd 15016, 15018, para. 9 (Enf. Bur. 2011) (citing rule 1.223's requirements that a party seeking intervention show the "interest of petitioner in the proceedings" and "how such petitioner's participation will assist the Commission in the determination of the issues in question").

⁸⁷ Indeed, in November 2009, AT&T took the deposition of Beehive's CEO. Defendants Exhibit No. 4, Deposition of James Charles McCown. See Beehive Petition at 11–12 ("Beehive could have attempted to intervene in this proceeding"); Beehive's Motion to Refer Issues to the FCC Under the Doctrine of Primary Jurisdiction, Civil No. 2:08-cv-00380 at 14–15 (C.D. Utah July 26, 2010) ("Moreover, allegations that Beehive and [All American] were involved in a traffic pumping 'scheme' are before the FCC, as is the precise question of whether [All American] operated as a sham entity in violation of [Section] 201(b) . . . Today, the issues are pending in an AT&T case against [All American], e-Pinnacle and ChaseCom in which AT&T names Beehive among the 'relevant non-parties.'").

⁸⁸ That the Commission disfavors intervention in complaint proceedings and does not have a specific rule regarding intervening in complaint proceedings does not excuse Beehive's failure to request intervention in this case. See Beehive Petition at 10–11. Indeed, *Teleconnect v. Bell Telephone*, which Beehive relies upon (Petition at 11) demonstrates that the Commission will consider properly-supported petitions to intervene. See *Teleconnect v. Bell Telephone*, 6 FCC Rcd at 5206, para. 19 ("At the very least, a petitioner for intervention must demonstrate an interest in the proceedings, show how the petitioner's participation will assist the Commission in determining the issues in question, and set forth any additional proposed issues.").

⁸⁹ *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Order on Reconsideration, 20 FCC Rcd 8578 (2005) (*AT&T v. BellSouth*).

⁹⁰ See Beehive Petition at 10–11; Beehive Reply at 4.

⁹¹ See *AT&T v. BellSouth*, 20 FCC Rcd at 8580, para. 6 (" . . . Sprint had every right and opportunity to petition to file an amicus brief or seek to intervene"). See generally, *AT&T Corp. v. Business Telecom, Inc.*, Order on Reconsideration, 16 FCC Rcd at 21754, n.21 (2001) (stating that, in a formal complaint proceeding, "[w]e will . . . consider on a case-by-case basis motions by non-parties wishing to submit amicus-type filings addressing the legal issues raised in this proceeding") (quoting *Pleading Cycle Established for AT&T Corp. v. Ameritech Corp.*, Public Notice, 13 FCC Rcd 12057, 12058 (Com. Car. Bur. 1998)). See, e.g., *Heritage Cablevision Assocs. v. Tex. Utilities Elec. Co.*, Memorandum Opinion and Order, 7 FCC Rcd 4192, 4192, paras. 6–7 (1992) (dismissing a non-party's

(continued . . .)

one option available to the Commission” was to find that Beehive was instrumental to the sham,⁹² and Beehive can hardly claim “surprise” by the Commission’s findings to that effect.⁹³

23. Similarly unavailing is the contention that Commission staff thwarted Beehive’s “last-ditch effort to participate in this proceeding” by failing to hold the *Order* in abeyance pending the filing of Sprint’s complaint effectuating the *Utah Court Referral*, which purportedly would have allowed Beehive to seek consolidation of the two cases.⁹⁴ This argument misses the point because it wrongly assumes that Beehive could not have participated at the Commission until Sprint filed its complaint. Beehive could have filed a motion to intervene *years* earlier when it learned that its conduct figured prominently in AT&T’s claims against the Defendants.⁹⁵ In all events, consolidating the two proceedings when the draft *Order* was on the verge of circulation would have made no sense.⁹⁶ The parties in this case generated a vast record.⁹⁷ Consolidation would have meant injecting new parties (Sprint and Beehive), as well as different tariffs, tariff periods, and defenses, into the proceeding after the record had closed. Moreover, the Commission would have had to devise a way to reconcile the *Utah Referral*

(Continued from previous page . . .) —————

Petition for Reconsideration of an order in an adjudicatory proceeding, where the non-party “failed to attempt to participate either as an intervenor or amicus,” though it “could have moved the Commission for leave to participate, either as amicus or intervenor, [even] after the pleading cycle closed.”)

⁹² See *AT&T v. BellSouth*, 20 FCC Rcd at 8580–81, para. 6. See, e.g., Amended Formal Complaint of AT&T Corp., File No. EB-09-MD-010 at 14, paras. 26, 29–34, paras. 54–60, 38–41, paras. 68–71 (filed Apr. 30, 2010); Initial Brief of AT&T Corp. in Support of Amended Complaint, File No. EB-09-MD-010 at 19–20 (filed Dec. 20, 2010); Reply Brief of AT&T Corp. in Support of Amended Formal Complaint, File No. EB-09-MD-010 at 3 (filed Jan. 14, 2011) (“AT&T’s Complaint clearly alleged that Beehive was an active participant with the CLECs in the sham arrangements at issue.”).

⁹³ See *AT&T v. BellSouth*, 20 FCC Rcd at 8580–81, para. 6. Nor can Beehive blame Sprint for Beehive’s failure to intervene. See Beehive Petition at 11–13. Whatever Sprint’s litigation strategy might have been, Beehive, of course, is responsible for protecting its own legal interests. Similarly, Beehive gets no traction from its complaint that it chose not to pursue intervention prior to the *Utah Court Referral* because it would have been faced with the burden of simultaneously litigating the sham-entity issue in court and at the Commission, risking conflicting decisions. Beehive Petition at 12. That risk existed whether Beehive intervened or not, because Beehive was actively defending and pursuing in multiple fora claims that implicated the sham-entity issue. See Beehive’s Petition for Declaratory Ruling, WC Docket No. 10-36 (filed Feb. 2, 2010); *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah, Public Service Commission of Utah*, Docket No. 08-2469-01, Report and Order at 9–12 (Apr. 26, 2010) (reflecting Beehive’s participation in proceedings directed at rescinding All American’s Certificate of Public Convenience and Necessity). Beehive also initiated discussions with Commission staff in November 2010 regarding the prospect of filing a formal complaint against Sprint. See Letter Ruling dated June 21, 2013 from Christopher Killion, Associate Chief, Enforcement Bureau, to Russell D. Lukas, Counsel for Beehive, Gary R. Guelker, Counsel for All American, Marc A. Goldman and William Lawson, Counsel for Sprint at 7, n.37.

⁹⁴ Beehive Petition at 12–13.

⁹⁵ See *supra* para. 22, note 88.

⁹⁶ In December 2012, Beehive asked the Commission to “consider whether Sprint’s complaint should be consolidated for disposition with the AT&T complaint pursuant to § 1.735(a) of the rules.” Letter from Russell D. Lukas, counsel for Beehive, to Anthony J. DeLaurentis, MDRD (dated Dec. 12, 2012) (on file in File No. EB-13-MD-003).

⁹⁷ *Order*, 28 FCC Rcd at 3487–88, para. 24, n.104 (noting that the record “exceeds 7,000 pages, including pleadings, discovery responses, deposition transcripts, court exhibits, Utah PSC exhibits, and other miscellaneous documents”). The record also includes deposition testimony of several Beehive officers and employees and Beehive’s discovery responses. See, e.g., *id.* at 3480–84, paras. 12–14, 16–17 nn. 34, 36, 40, 43, 51–52, 54, 60, 62–65; 3488–89, paras. 26–28, nn. 112, 115, 118, 120–22.

Order's directive regarding the parties (including Beehive) not disputing the undisputed facts detailed in the *Utah Referral Order* with the absence of any such limitation in the First Court Referral Order or the Second Court Referral Order giving rise to the instant litigation. Staff appropriately exercised its discretion not to consolidate the cases.⁹⁸

IV. ORDERING CLAUSES

24. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(i), 4(j), 201, 203, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 208, 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom for Reconsideration and Clarification is DISMISSED on procedural grounds and, as an independent and alternative basis for this decision, DENIED for the reasons stated herein.

25. Accordingly, IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and Sections 1.41 and 1.727 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.727, that All American's Emergency Motion to Address Jurisdictional and Due Process Issues is DENIED.

26. Accordingly, IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201, 203, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 208, 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Beehive's Petition for Reconsideration is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹⁸ See 47 C.F.R. § 1.735(a). See also *Motion to Consolidate and Reassign Order* at 2.